COURT OF APPEALS NO. 46312-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

V.

DANIEL BLANE HECKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Garold E. Johnson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel at sentencing.

Issue Pertaining to Assignment of Error

Where defense counsel moved for an exceptional sentence below the standard range, but failed to cite the relevant authorities indicating the court had discretion to do so, and where the court erroneously believed the complainant's willing presence did not constitute a mitigating factor the court could consider in sentencing appellant for violating a no contact order, did appellant receive ineffective assistance of counsel at sentencing?

B. STATEMENT OF THE CASE[1]

Following a bench trial in Pierce County Superior Court, appellant Daniel Hecker was convicted of felony violation of a no contact order (VNCO) and giving a false statement to a police officer. CP 19-37. At trial, the state's evidence showed Hecker was a passenger in a reportedly stolen car pulled over by police on September 20, 2012. RP 122-23.

During the investigation, police discovered court orders prohibiting Hecker from having contact with the other passenger in

the car, Kathy Jo Devine. RP 126-127. One of the police officers testified Hecker initially gave a false name, but the police identified him as Daniel Hecker after obtaining booking photos of the individual named in the no contact orders. RP 125-128. The officer testified that when confronted, Hecker admitted his true identity and knowledge of the no contact orders. RP 129-130.

At a pretrial hearing held to determine the admissibility of Hecker's statements, deputy Aaron Thompson testified he asked Kathy Jo Devine why she was in the car with Hecker despite the no contact orders. RP 26. Devine responded "[s]he was facing tough times, and Mr. Hecker was only helping her out." RP 26.

The state alleged the VNCO was a felony, based on prior VNCO convictions, including: (1) a 2012 Pierce County District Court conviction for violating a no contact order; and (2) any one of five Tacoma Municipal Court convictions from the 1990s. RP 40. For the former, the state offered a certified copy of the judgment and sentence. RP 40. For the latter, however, the judgment and sentences no longer existed. RP 41.

As proof of the prior convictions, the state therefore sought to admit court dockets for the five cases. RP 40-41. During a

[1] The verbatim report of proceedings is referred to as "RP" and contained in three

pretrial hearing, the state called clerk Deborah Dively to lay a foundation; she processes records for Tacoma Municipal Court. RP 42-43. Admittedly, however, Dively has never served as an in-court clerk and was not trained "on the process of how an in-court clerk works." RP 55.

When records are created in court – such as the charging document and judgment and sentence – they're put in files and kept "in an open file type system." RP 44, 47-48. "Once the record closes, eventually it gets boxed up, archived, and sent to our warehouse." RP 45. After three years, the records are destroyed. RP 45.

The court has dockets available if actual hard copies of records no longer exist. RP 46. According to Dively, a court docket generally notes everything that happens in a case from beginning to end. RP 46. Information on the docket is input by reference to "what's on court orders and what the judge writes[.]" RP 47. The orders and notes are input manually by a clerk, but not the one who was present at the court hearing. RP 47, 66-67. It is the "clearing clerk" who "processes all the information and inputs it into the

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bound volumes, consecutively paginated.

computer system." RP 47, 70. In doing so, the clerk must "look at a document and interpret it[.]" RP 55.

Dively acknowledged that once the information is input, "it could be altered." RP 48. All employees of the Tacoma Municipal Court have access to the court docket information. RP 45, 48.

Dively testified records such as charging documents and judgment and sentences from the 1990s have been destroyed and are no longer available. RP 49.

Through Dively, the state offered exhibits one through five. RP 50. Dively certified exhibit one was a court docket of Tacoma Municipal Court (TMC) cause number B-00030949, involving a VNCO charge against Daniel Hecker. RP 51. It listed a "guilty" finding and contained personal information, such as "weight, height, eyes, hair color, identifying information as far as tattoos, things of that nature." RP 51.

Similarly, Dively certified exhibits two through five were court dockets, respectively, of TMC cause numbers B-00022703, B-00022528, B-00022705 and B-00022275, each involving a VNCO charge against Daniel Hecker, listing a "guilty" finding, as well as identifying information. RP 51-52. There were no actual records remaining for these cause numbers. RP 53.

The state argued the documents should be admitted as certified copies of public records. RP 74. Defense counsel objected on two grounds: (1) the dockets did not indicate Hecker was convicted of violating a court order issued under one of the qualifying statutes (RP 75-76; see also CP 8);[2] and (2) the dockets were testimonial and therefore violated Hecker's Sixth Amendment right to confront his accusers. RP 80.

The state countered the dockets were not prepared in anticipation of litigation but in the "general conducting of business of the Tacoma Municipal Court." RP 83. The court ruled the dockets were public records and therefore admissible absent confrontation, because they were created for the administration of an entity's affairs and not for the purpose of establishing or proving

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[2] Under RCW 26.50.110(5):

> A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

Emphasis added.

some fact at trial. RP 93-94. The court did not address the first objection. RP 157, 165.

Hecker waived his right to a bench trial and the parties agreed Dively's pre-trial testimony could be incorporated for purposes of the trial, as well as the exhibits offered through her. RP 87, 97-98. The state offered certified copies of current no contact orders from Pierce County District Court, Fife Municipal Court and Lakewood Municipal Court, respectively. RP 98. The state also elicited the testimony of deputy Aaron Thompson, as set forth above, regarding the circumstances leading to the current charges. RP 122-130.

In closing the defense argued the state failed to prove one of the required prior convictions to elevate the VNCO to a felony. RP 139. The dockets for the Tacoma Municipal Court convictions indicated only the alleged violation of Tacoma Municipal Code § 8.105.75 and a finding of guilty; they did not indicate whether Hecker was convicted of violating an order issued pursuant to one of the qualifying statutes. RP 142-48.

The prosecutor indicated she provided the court and opposing counsel a copy of the current Tacoma Municipal Code section, which indicated it was passed in 1984 and modified in

1995, which bookended all of Hecker's TMC VNCOs. RP 162. She then went to the Tacoma Law Library and obtained:

> . . . [t]he 1985 ordinance and made a copy of the section from the ordinance. That section refers to Chapter 263 of the Domestic Violence Prevention Act, which I also got a copy of and provided to the court and defense counsel.[3]
>
> Domestic Violence Prevention Act refers to RCW 10.99 and RCW 26.09, which by definition under the current felony violation protection order statute includes orders that fall within the definition.
>
> . . .
>
> Right at the start of the Domestic Violence Prevention Act it talks about this is an act relating to domestic violence, and it lists the chapters and the RCWs that it modifies.

RP 162-63.

The court ruled defense counsel's objection to the inapplicability of the dockets was not waived, although it was not renewed when the court failed to address it pretrial. RP 164-65. Moving to the substance of defense counsel's objection, the court found the evidence sufficient to find Hecker was convicted of violating one of the orders referenced in RCW 26.50.110(5), because the Tacoma Municipal Code referenced the Domestic Violence Protection Act, which in turn, referenced the relevant statutes under which the orders had to be issued. RP 167.

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[3] Laws of 1983, Chapter 263, § 12 is also the enacting statute for RCW 26.50.110.

At sentencing, defense counsel moved for an exceptional sentence down on grounds the prior convictions were over ten years old, and unlike the felony driving under the influence (DUI) statute, there is no ten-year time bar as to how far back the state may reach for prior convictions under RCW 26.50.110(5). Defense counsel argued the consequence was unfair. CP 13-16.

Defense counsel also noted Hecker "was merely in the presence of the protected party, and was there at the request of the protected party." CP 15. Defense counsel questioned whether, under the circumstances, Devine was a victim. RP 190. Defense counsel argued the circumstances were more in the nature of contempt, and that the court was the aggrieved party, not Devine. RP 190. However, defense counsel did not cite any authority suggesting the court could consider this fact as mitigating. CP 15.

During allocution, Hecker explained the nature of the contact with Devine, but also apologized for violating the order:

> Your Honor, I was leaving the grocery store. Ms. Devine approached me. She said she needed help. I agreed to give her help. She had become homeless. I was going to pay for a room.
>
> I wasn't – I didn't set out to break the law. I just did. For that I apologize.

RP 192.

The court rejected the argument that the ten-year limitation for prior convictions in the context of felony DUI was an appropriate basis to depart from the standard range in the context of felony VNCO, reasoning the argument may best be made to the Legislature. RP 192.

The court also rejected Devine's likely participation in the offense as a basis for a departure:

> One of the considerations I would assume that they [the Legislature] would make – and certainly this court considers important – is domestic violence is a very, very serious problem. No contact orders are there for a reason. And it's not necessarily just to – a matter of contempt of this court, which indeed, is some of the issue here, I suspect, when they came down to sentencing schedule.
>
> But it's also because we see it over and over and over and over again. You put out an order of no contact. By gosh, there's contact. And before we know it there's violence.
>
> Now, whether there was in this case or not – whether there was in this case or not is really not necessarily the issue. What the Legislature is looking at, I assume what they are looking at is an overall picture. And what they're dong is saying we will not tolerate this. As much as we possibly can we are going to try to put an end to it.
>
> And part of that is instructing this court to what the guidelines are. And they aren't guidelines like, you know, a dashed yellow down the middle of the street. These are guidelines like the concrete barriers that they give the court. This isn't something that the court just willy-nilly says well, in this particular case I don't like them so I'm going to do what I want to do. That's not the way it works.

> There are the possibility of doing exceptional sentences downward, but the facts have to be exceptional. I don't find these facts are exceptional. This is exactly what this order is intended to cover. Exactly what it's intended to cover.
>
> . . .
>
> I do appreciate this was a non violent situation, and that's why it's at the lowest range. Id does appear to me – without the alleged victim being here there's not much way for me to know one way or the other – but the evidence before me is it's something she may have invited. But this happens with regularity when there's no contact orders in the first place. Something the Legislature is fully aware of. These are sometime invited by the alleged victim. In fact, oftentimes are.

RP 193-94.

The court therefore imposed the low end of the standard range on the VNCO, 33 months. CP 25. On the misdemeanor making a false statement, the court imposed a suspended sentence concurrent to the felony. CP 33-37. This appeal follows. CP 56-

C. ARGUMENT

HECKER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

The trial court has authority to depart downward from the standard sentence range based on the mitigating factor that the individual who was subject of the no contact order was willingly in the defendant's presence. State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008). Defense counsel moved for an exceptional

sentence in part based on Devine's willing presence with the Hecker, but failed to cite any relevant authority informing the court that these circumstances constituted a valid basis to depart from the standard range.

At sentencing, the court recognized Devine likely invited the contact at issue here, but erroneously believed such did not constitute a basis to depart from the standard range. The court's misunderstanding of the law is evidenced by its comment it could not "willy-nilly" disregard the standard range, and its opinion an alleged victim's initiation of contact was already something the Legislature took into consideration in enacting the penalties. Defense counsel's failure to properly advise the court of its sentencing authority constituted ineffective assistance of counsel.

The Sixth Amendment of the United States Constitution guarantees defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); State v. Rupe, 108 Wash.2d 734, 741, 743 P.2d 210 (1987) ("Sentencing is a critical stage of the proceedings,

at which a defendant is constitutionally entitled to be represented by counsel.").

To demonstrate ineffective assistance of counsel, an appellant must show that the attorney's performance was deficient and that the deficiency was prejudicial. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). Deficient performance is that which falls below an objective standard of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). The reasonableness of counsel's conduct is judged "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Under RCW 9.94A.535(1), the court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. One statutorily enumerated mitigating factor is that, "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

In a case similar to that here, Leo Bunker moved for an exceptional sentence downward following his conviction for violating a no contact order, on grounds the protected party had been a willing participant in the commission of the offense. Bunker, 144 Wn. App. at 411. The trial court declined to depart from the standard range, however, erroneously believing it did not have discretion to do so. Id.

On appeal to Division One, the court reversed and remanded for resentencing. Bunker, 144 Wn. App. at 422. The court noted that while consent is not a defense to violating a no contact order, a victim's willing presence is a mitigating factor the court may consider at sentencing. Id.

Defense counsel's failure to inform the trial court of its sentencing authority may constitute ineffective assistance of counsel. State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). There, defense counsel failed to apprise the court of its authority to depart from the standard range on grounds the multiple offense policy of the Sentencing Reform Act resulted in an excessive sentence. McGill, 112 Wn. App. at 97.

Although there was case law supporting a downward departure in McGill's case, his attorney did not move for an

exceptional sentence or cite the relevant authorities that would have supported it. McGill, 112 Wn. App. at 101-102. Division One of this Court held defense counsel performed deficiently: "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." McGill, at 102. Because the appellate court could not say the trial court would have imposed the same sentence had it known an exceptional sentence was an option, reversal was required. McGill, 112 Wn. App. at 100-101; see also State v. Miller, 181 Wn. App. 201, 324 P.3d 791 (2014) (remand for resentencing required where it was not clear court would have imposed same sentence had it known of its discretion).

Reversal is likewise required here. As in McGill, defense counsel failed to cite to the relevant authorities to inform the court of the parameters of its decision-making authority. As a result, the court was unaware of its discretion to impose an exceptional sentence in Hecker's case. As in McGill, it is not possible to say whether the trial court would have imposed the same sentence had it known an exceptional sentence was an option. This is evidenced by the court's comments it could not disregard the standard range,

and that the victim's willing participation was not "exceptional," i.e. a potentially mitigating factor. Under the Court's decision in Bunker, this was a misunderstanding on the court's part. Because Hecker was prejudiced by his attorney's failure to advise the court of its discretion, remand for resentencing is required.

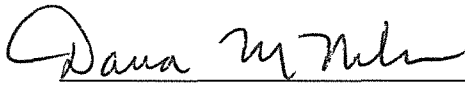
D. CONCLUSION

This Court should remand for resentencing because Hecker received ineffective assistance of counsel at sentencing.

Dated this 25th day of November, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



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DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46312-1-II
	)	
DANIEL HECKER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] DANIEL HECKER
DOC NO. 947966
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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